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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

June 3, 2004

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

In the Matter of Amendment of Parts 1 and 63 of the Commission's Rules,
Notice of Proposed Rulemaking, IB Docket No. 04-47, 19 FCC Rcd 4231 (2004);
see also 49 Fed. Reg. 13276 (March 22, 2004)

Dear Madam Secretary:

Enclosed please find an original and four (4) copies of the comments filed by the U.S. Department of Commerce's National Oceanic and Atmospheric Administration (NOAA), in the above-referenced proceeding. You will also find an electronic file containing the comments on the enclosed diskette in WordPerfect.

In addition, pursuant to FCC filing requirements, a copy of NOAA's comments have been filed with each of the people listed below. Please direct any questions you may have to Ms. Catherine Lewers, Office of the Assistant General Counsel for Ocean Services, at (301) 713-2967, extension 218.

Respectfully submitted,

Karl Gleaves
Assistant General Counsel
for Ocean Services

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List ABCDE

Enclosures

cc: Qualex International

James Bail, Chief, Policy Division, International Bureau, FCC

David Krech, Senior Legal Advisor, Policy Division, International Bureau, FCC

Belinda E. Nixon, Attorney, Policy Division, International Bureau, FCC

Judith B. Herman, FCC



**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Amendment of Parts 1 and 63 of the
Commission's Rules

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IB Docket No. 04-47

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**REPLY COMMENTS OF THE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

The U.S. Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) respectfully submits the following reply comments in response to the Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding.¹ NOAA is responsible for implementing the Coastal Zone Management Act of 1972, as amended (CZMA).² NOAA works directly with coastal states and territories to carry out its CZMA responsibilities by supporting the development and implementation of Coastal Management Programs and National Estuarine Research Reserves; providing technical, management and financial assistance to coastal program and reserve operations; undertaking projects with program-wide or ecosystem-wide benefits; and promoting coastal stewardship on a variety of critical issues.

I. Background

The CZMA authorizes coastal states to develop coastal management plans, subject to federal approval through NOAA.³ States with federally-approved programs are entitled to review

¹ *In the Matter of Amendment of Parts 1 and 63 of the Commission's Rules*, Notice of Proposed Rulemaking, IB Docket No. 04-47, 19 FCC Rcd 4231 (2004); *see also* 49 Fed. Reg. 13276 (March 22, 2004).

² 16 U.S.C. § 1451-1465 (1996).

³ *See* 16 U.S.C. § 1454.

for consistency with those programs any “required federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state.”⁴

In the NPRM, the Federal Communications Commission (FCC) seeks comment on whether the CZMA applies to cable landing license applications, and, if so, whether the FCC should modify section 1.767 of the FCC’s rules regarding cable landing licenses to ensure compliance with the CZMA.⁵ The NPRM also seeks comment on alternative options for ensuring such compliance.⁶

II. The CZMA Does Not Require the FCC to Develop Specific Regulations for Coastal Zone Management.

NOAA believes that it is unnecessary for the FCC to issue CZMA regulations related to submarine cable landing licences because NOAA’s regulations already fully address potential state CZMA review of FCC licenses for submarine cables. NOAA currently has regulatory authority over the state certification process and requirements for all applicants for federal licenses for activities in or outside of coastal zones, pursuant to CZMA section 1456(c)(3)(A). NOAA’s regulations, at 15 C.F.R. part 930, subpart D (described in detail in Part III, below), provide the process for determining when an applicant for FCC submarine cable landing licenses are required to certify that the proposed activity complies with the enforceable policies of the state’s approved CZMA program.

⁴ 16 U.S.C. § 1456(c)(3)(A).

⁵ See NPRM at ¶¶ 33, 35 (*referring to 47 C.F.R. § 1.767.*).

⁶ *Id.* at ¶ 35.

It appears that, based on the comments of the International Cable Protection Committee (ICPC) on the NPRM (discussed in Part IV, below), one purpose of the NPRM may have been to fill a perceived gap in NOAA's regulatory structure regarding compliance with the CZMA by foreign companies applying for FCC licenses. However, no such gap exists and the CZMA and NOAA's regulations already determine when a foreign company applying for a federal license or permit is subject to the CZMA review process. The CZMA provides

*any applicant for a required Federal license or permit to conduct an activity, in or outside the coastal zone, affecting any land or water use or natural resource of the coastal zone of the state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program*⁷

NOAA's regulations define "applicant:"

The term "applicant" means any individual, public or private corporation, partnership, association, or other entity organized or existing under the laws of any nation, State, or any State, regional, or local government, who, following management program approval, either files an application for a required individual federal license or permit, or who files a consistency certification for a required general federal license or permit under § 930.31(d) to conduct an activity affecting any coastal use or resource⁸

This provision covers applicants from foreign countries that apply for FCC submarine cable landing licenses. NOAA clarified the applicability of the statutory requirement to foreign nationals in the revised regulations that implement the federal consistency provision of the CZMA.⁹ In its preamble to the 2000 regulations, NOAA explained that applicants from other nations may also be subject to the CZMA:

⁷ 16 U.S.C. § 1456(c)(3)(A) (emphasis added).

⁸ 15 C.F.R. § 930.52.

⁹ See 65 Fed. Reg. 77123-77175 (Dec. 8, 2000); and 15 C.F.R. § 930.52.

Section 930.52 is amended to add to the definition of “applicant” applicants from other nations for a United States required approval, and applicants filing a consistency certification under the proposed general permit consistency process under section 930.31(d). Regarding other nations, the CZMA requires any applicant for a required federal license or permit to certify consistency with management programs. There may be instances where a foreign company or individual must obtain a United States approval.¹⁰

Accordingly, an amendment to the FCC’s submarine cable landing license rules to include a requirement that applicants, including foreign applicants, submit to the FCC the CZMA certification and a statement that the relevant state has concurred with the certification is unnecessary and duplicative.

III. FCC Regulations Mandating Consistency Reviews for Submarine Cable Landing Licenses Would Be Inconsistent With NOAA’s Regulations, Process, and Determinations of Coastal Effects for Federal License or Permit Activities.

NOAA’s regulations provide a process to determine when such federal license or permit activities are subject to state CZMA consistency review. If a state wants to subject each occurrence of a particular federal license or permit activity to automatic state review, NOAA’s regulations require the state to “list” the license or permit in its federally approved coastal management program (CMP).¹¹ If a state wants automatic review of such listed federal license or permit activities proposed for areas outside a state’s coastal zone, the state must describe geographic locations outside the state’s coastal zone where such activities will be subject to consistency review.¹²

¹⁰ 65 Fed. Reg. at 77145.

¹¹ 15 C.F.R. § 930.53(a).

¹² *Id.*

Under NOAA's regulations, NOAA must approve both the listing and geographic location descriptions.¹³ NOAA's approval is based on whether the listed activity or the location of a listed activity in a specific geographic area will have reasonably foreseeable effects on the uses or resources of the state's coastal zone.¹⁴ If a particular federal license or permit is not listed (known as an "unlisted" activity), or is listed but the proposed activity would be located outside the state's coastal zone and outside a geographically-described location under 15 C.F.R. § 930.53(a)(1), a state can only review the activities by seeking NOAA approval on a case-by-case basis.¹⁵ NOAA approval for state review of unlisted activities is also based on whether coastal effects are reasonably foreseeable.¹⁶

NOAA's process for determining when activities are subject to CZMA review has been operating since 1979. The process provides notice to applicants and the licensing federal agency of those federal license or permit activities that are automatically subject to a state's CZMA review. The process further gives states the opportunity to seek permission to review unlisted activities (or listed activities outside the coastal zone and outside an approved geographic location) that may have coastal effects. If the FCC were to adopt regulations *mandating* consistency review for all of its licenses – even those where NOAA had determined there were no reasonably foreseeable coastal effects – such regulation would be inconsistent with NOAA's regulations and process. Therefore, the FCC should not adopt CZMA-specific regulations.

¹³ 15 C.F.R. §§ 930.53(a) and 930.53(c).

¹⁴ 15 C.F.R. § 930.53. *See also* 15 C.F.R. §§ 930.54(c) and 930.154(c).

¹⁵ 15 C.F.R. §§ 930.53(a)(2) and 930.54.

¹⁶ 15 C.F.R. § 930.54(c).

As for the FCC licenses in question, the coastal states have been reviewing submarine cable projects through the associated Army Corps of Engineers permit, and not the FCC licenses. In fact, no state has listed the licenses in its CMP and no state has sought NOAA approval to review such a license on a case-by-case basis as an unlisted activity. It should be left up to the state, however, to avail itself of the process in NOAA's regulations to subject the activity to state CZMA review. If a state does choose to seek NOAA approval either to list the FCC license in its CMP or seek permission to review a particular FCC license application, NOAA will decide whether the activity would have reasonably foreseeable effects on any land or water use of the state's coastal zone such that state CZMA review is required. A further FCC review is unwarranted.

IV. The Comments of the International Cable Protection Committee Contain Incorrect Statements.

The International Cable Protection Committee (ICPC) submitted comments to the FCC's NPRM that object to incorporating the CZMA consistency requirement in the submarine cable landing license regulations. While NOAA agrees with ICPC's objection, ICPC's comments in support of that objection contain inaccuracies regarding the legal status of FCC's submarine cable landing licenses and certain actions purportedly taken by New Jersey, Oregon, and California in connection with their CMPs. Of particular note are the following two quotations from ICPC's comments:

[t]here is no legal requirement that the license issued pursuant to the Cable Landing Act of 1921 (47 USC §§ 34-39) comply with the CZMA. Notwithstanding this fact, the FCC is now considering, 32 years after the CZMA was enacted, whether its rules should now

be modified to “assure” compliance with the CZMA.¹⁷

...

A review of the CZMA process in three states shows why this is so. In Oregon, the state routinely regulates international cables beyond its 3 NM territorial sea. In California, besides routinely regulating international cables out to 200 NM, the state has even suspended cable permitting. In New Jersey, the state proceeded to regulate cables out to 200 NM over the specific objections of the Department of Defense.¹⁸

The ICPC’s first statement is incorrect because, as described above, the CZMA applies to any applicant for a federal license or permit for an activity that will have coastal effects. The statutory language is unambiguous that there are no exceptions to this requirement.¹⁹ This was further emphasized in the Conference Report for the 1990 amendments to the CZMA when the conferees stated that “no federal agency activities are categorically exempt from this requirement.”²⁰

The ICPC’s second statement regarding Oregon, California, and New Jersey is also incorrect. These states do not regulate submarine cables outside state waters (three nautical miles from shore) and the CZMA does not grant these states authority to regulate activities outside state waters. Moreover, NOAA has never approved any CZMA policies in these states that would regulate submarine cables outside of state waters. The statement is also inapplicable to

¹⁷ Jon Reynolds, ICPC Secretariat, to FCC, IB Docket No. 04-47 at 2 (May 6, 2004).

¹⁸ *Id.* at 3, n. 13.

¹⁹ CZMA section 307(c)(3)(A) states that

“any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide” a consistency certification. 16 U.S.C. § 1456(c)(3)(A), *emphasis added*.

²⁰ H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 968-975 (quoted in NOAA’s 2000 preamble). *See also* 65 Fed. Reg. 77124-77125 (Dec. 8, 2000) (preamble to NOAA’s 2000 rule).

New Jersey for an additional reason: New Jersey's regulations regarding submarine cables are expressly limited to state waters. State law defines the "Atlantic Ocean" for purposes of New Jersey's regulations as including the area of the Atlantic Ocean extending out to the three-mile limit of the New Jersey territorial sea and bounded by New York and Delaware state waters.²¹

States can, and are specifically authorized under the CZMA and NOAA's regulations to, review federal license or permit activities having coastal effects, regardless of location, and apply their federally-approved enforceable policies to such projects through the CZMA review process described in Part III, above. This authority, however, is not the same as "regulating" activities, e.g., by state permit, lease, fees, or other means, outside of state jurisdiction, as ICPC seems to suggest.

V. Conclusion

A requirement in the FCC's cable landing license regulations to ensure CZMA compliance would not improve the state process of reviewing federal licenses. Instead, it will only serve to complicate the process and burden applicants and states with additional, unnecessary filing requirements. Further, any regulations the FCC adopts mandating state consistency reviews for all submarine cable landing license applications would be inconsistent with NOAA's regulations, process, and determinations of coastal effects for activities that

²¹ N.J.A.C. § 7:7E-4.1(b)1.

require a federal license or permit. For these reasons, NOAA urges the FCC to refrain from including requirements to ensure CZMA compliance in revised submarine cable landing license regulations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Karl Gleaves". The signature is fluid and cursive, with a long horizontal stroke at the end.

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June 3, 2004